

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WEST VIRGINIA ADJUTANT GENERAL,

Appellant,

v.

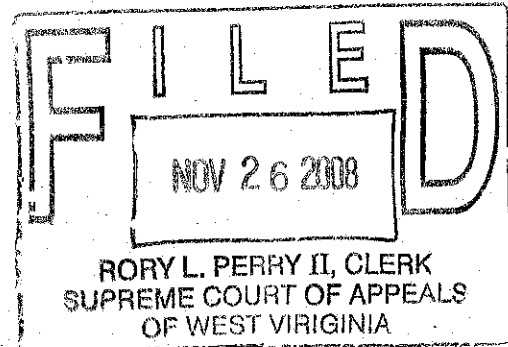
APPEAL NO. 34270

JAMEY LITTLE,

Appellee.

REPLY BRIEF

SUBMITTED BY:



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**REPLY BRIEF**

**DISCUSSION OF LAW**

By looking at the way in which the plaintiff defines the “public policy” question which he claims must be answered by this Court, it is clear to see how the plaintiff misunderstands or misconstrues the issues involved in this case. By enacting W.Va. Code § 15-1B-26, the Legislature was not trying to deny the firefighters and security guards employed by the Adjutant General their rights under the West Virginia Human Rights Act or to “excuse compliance with the WVHRA.” W.Va. Code § 15-1B-26 does not discriminate against anyone on the basis of disability, age, race, gender or any other characteristic or condition. W.Va. Code § 15-1B-26 sets forth a requirement for employment that applies to everyone equally – it requires that firefighters and security guards who are employed by the Adjutant General be members of the West Virginia National Guard, period. Thus, despite plaintiff’s contentions, W.Va. Code § 15-1B-26 is not in conflict with the West Virginia Human Rights Act, and the Adjutant General does not violate the West Virginia Human Rights Act by complying with it.

The Legislature enacted W.Va. Code § 15-1B-26 as a direct result of the concerns articulated by the Adjutant General, which he reiterated during his evidentiary deposition taken in this case and submitted as part of the record. While the plaintiff wishes to call these reasons

“hyperbole” and “bordering on the absurd,” it is clear that the Legislature disagreed. The Adjutant General testified that he relies upon federal military funding in order to provide the training, uniforms and equipment available to the firefighters and security guards employed by him. Without military affiliation, the federal government would not provide such training and equipment. Further, if the Adjutant General were continually forced to retain firefighters who had lost their military affiliation, he may very well end up with an entirely civilian force. As the General explained, this could jeopardize the retention of the 130<sup>th</sup> Airlift Wing, as the only real reason the firefighters are there is to protect the equipment belonging to the U.S. military. It would also severely impact his ability to rotate National Guard members for deployment, which would unfairly increase the burden on those individuals who remained members of the WVANG. (See *Exhibit 2* to Reply Memorandum in Support of Defendant’s Motion for Summary Judgment, pp. 10-17). The plaintiff can characterize these reasons in any way he wishes, but the importance of these things to the Adjutant General and the 130<sup>th</sup> Airlift Wing was clearly apparent to the Legislature, and the result was the enactment of W.Va. Code § 15-1B-26.

The plaintiff claims that the Legislature was required to include language in W.Va. Code § 15-1B-26 that “explicitly extinguished Appellant’s obligations not to discriminate against his employees.” However, this further misses the point. W.Va. Code § 15-1B-26 does not exempt the Adjutant General from following the law. It sets forth a legitimate, nondiscriminatory requirement for employment as a firefighter or security guard for the Adjutant General, a requirement that was in place long before the statute was enacted and one with which the firefighters and security guards employed by the Adjutant General were intimately familiar, as it was already set forth as a prerequisite for employment at the time they were hired.

The West Virginia Human Rights Act prohibits adverse employment action against an individual based upon a discriminatory motive or intent. As set forth in the Adjutant General's Appellant Brief, there was no discriminatory motive or intent in this case. The Adjutant General followed the law which mandated military membership as a prerequisite for employment with the Adjutant General's department. West Virginia Code § 15-1B-26 required that "[o]nly firefighters and security guards who are members of the West Virginia National Guard may be employed by the adjutant general as firefighters and security guards." Because plaintiff was discharged from the WVANG, the Adjutant General was mandated to discharge the plaintiff as a firefighter, *regardless* of the reason for the failure to maintain membership in the WVANG. (See *Exhibit E* to Memorandum of Law in Support of Defendant's Motion for Summary Judgment, pp. 32-33).

The plaintiff has not come forth with any evidence to contradict the sworn testimony of General Tackett that his only motive and intent was to follow the statute and the longstanding policy of requiring military membership for employment as a firefighter, and it is the burden of the plaintiff to do so in order to survive a motion for summary judgment. As this Court stated in Powderidge Unit Owners Ass'n. v. Highland Properties, Ltd., 474 S.E.2d 872 (W.Va. 1996):

If a party moving for summary judgment fails to point to absence of evidence supporting nonmoving party's case with respect to a matter on which the nonmoving party will bear the burden of proof, the motion must be denied, regardless of nonmovant's response but, if movant does make that showing, the nonmovant must go beyond the pleadings and contradict that showing by pointing to specific facts demonstrating a trialworthy issue by identifying specific facts in the record and articulating the precise manner in which that evidence supports [his] claims.

Id. at 879. As this Court further stated in Skaggs v. Elk Run Coal Co., Inc., 479 S.E.2d 561 (W.Va. 1996), "To get to the jury, the employee must offer sufficient evidence that the employer's explanation was pretextual to create an issue of fact." 479 S.E.2d at 583. The

plaintiff has simply failed to point to any set of facts in the record in this case that would demonstrate a trialworthy issue as to the Adjutant General's intent.

The plaintiff also tries to argue that W.Va. Code § 15-1B-26 should be construed to provide an exception to the military membership requirement which would benefit him in this case. The plaintiff claims that the Adjutant General "is trying to convince the Court that the grandfather clause should be read very narrowly." However, in reality, the Adjutant General is asking this Court to give the statute its plain meaning, and the meaning intended by the Legislature at the time it was enacted.

As is clear from a reading of the statute, it in fact states the opposite of what the plaintiff asserts that it says. The statute states that "only firefighters and security guards who are members of the West Virginia national guard may be employed by the adjutant general as firefighters and security guards." This provision clearly states that national guard membership is a prerequisite to employment as a firefighter or security guard with the Adjutant General.

The statute goes on to state, "Provided, That any person employed as a firefighter on the effective date of this section who is not a member of the West Virginia air national guard may continue to be employed as a firefighter." This language clearly states that the only exception allowed by the statute is for those who, *on the effective date of the section*, were *not members of the West Virginia air national guard*. In other words, the only exception allowed by the statute is for those few individuals who were civilian firefighters at the time the statute was enacted. The statute does *not* state that "any person employed as a firefighter on the effective date of this section who *is* a member of the West Virginia air national guard may continue to be employed as a firefighter." Thus, the statute says the exact opposite of what the plaintiff wants this Court to find that it says, and its "plain meaning [should] be accepted without resorting to the rules of

interpretation.” Cogar v. Lafferty, 219 W. Va. 743, 746, 639 S.E.2d 835, 838 (W.Va. 2006); Syl. pt. 2, State v. Elder, 162 W. Va. 571, 165 S.E.2d 108 (1968).

However, if one must look to the intent behind the statute in order to interpret the language used, the Adjutant General has testified that the statute was clearly intended to achieve exactly what it says. The Adjutant General was directly involved in the passage of the legislation, and has testified that the statute was intended to “grandfather” those select few individuals, at the 167<sup>th</sup> Airlift Wing in Martinsburg, West Virginia, who were civilians at the time the statute was enacted. Since those individuals were already employed as civilian firefighters at the time the military membership requirement was first implemented in 1989, it would have been patently unfair to terminate their employment based upon a brand new requirement that was not in place at the time they were hired.

However, since the time those firefighters were grandfathered, no other civilian firefighters have been hired, and no other exceptions have been made. Every individual hired since 1989 has been made aware of the military membership requirement at the time they apply for the position, and every individual hired since 1989 has been held to the requirement. (See ***Exhibit E*** to the Memorandum in Support of Defendant’s Motion for Summary Judgment, pp. 23-26; see also ***Exhibit 2*** to Reply Memorandum in Support of Defendant’s Motion for Summary Judgment, pp. 22-25).

Additionally, since the filing of this action, the West Virginia legislature has passed West Virginia Code § 15-1J-1, *et seq.* (2008), which further clarifies the importance of federal military funding to the State and the Adjutant General’s office, and reiterates the requirements of W.Va. Code § 15-1B-26 for firefighters who are employed by the newly established West Virginia Military Authority administered by the Adjutant General’s department. The plaintiff argues that



the following language supports his suggested reading of W.Va. Code § 15-1B-26. W.Va. Code § 15-1J-5(c) states,

(c) Security guards and military firefighters hired by the authority under the provisions of this article will continue to have the same authority and must meet the requirements as set forth in section twenty-two, article one-b, chapter fifteen of this code and section twenty-six of said article.

As stated by the plaintiff, this section specifically refers to only those individuals who are *hired* by the West Virginia Military Authority. One would think that such a conclusion is obvious, as the Authority did not exist prior to the enactment of W.Va. Code § 15-1J-1, *et seq.*, and thus could not already have employees on its payroll prior to the statute's effective date. However, the newly enacted statute also states that employees hired by the Authority must meet the same requirements as were already set forth in W.Va. Code § 15-1B-26. W.Va. Code § 15-1J-5 does not contain any language that its enactment is intended to alter the plain language of W.Va. Code § 15-1B-26.<sup>1</sup>

### CONCLUSION AND PRAYER FOR RELIEF

The plaintiff cannot demonstrate that his dismissal as a firefighter, and transfer to a non-military position in the Adjutant General's office, was motivated by a discriminatory intent on the part of the Adjutant General. Further, based upon the clear language of W.Va. Code § 15-1B-26, and the clear intent of the statute, the plaintiff cannot show that the "grandfathering" provision in the statute applies to him in order to afford him any protection in this case.

Therefore, based on the foregoing, the Defendant, WV Adjutant General, respectfully requests that this Court find that the Adjutant General's reliance upon the military membership

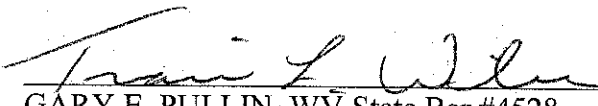
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<sup>1</sup> Of course, all employees *hired* under the new West Virginia Military Authority will include those firefighters and security guards who are already employees of the Adjutant General, so the issue in this case regarding the interpretation of W.Va. Code § 15-1B-26 will be moot as to the other employees of the Adjutant General who will be subject to the military membership requirement set forth in W.Va. Code § 15-1J-1, *et seq.* when they are *hired* into the West Virginia Military Authority.

requirement in W.Va. Code § 15-1B-26 demonstrates a legitimate, nondiscriminatory reason for the plaintiff's dismissal as a firefighter and transfer to a non-military position. Further, the Adjutant General respectfully requests that this Court apply the plain language of W.Va. Code § 15-1B-26 to this case and find that the plaintiff was not intended to be "grandfathered" by any provision in the statute. Accordingly, the Adjutant General requests that this Court answer the certified question in two parts: 1) Yes, the Adjutant General's reliance on W.Va. Code § 15-1B-26 is a complete defense to plaintiff's claim of disability discrimination under the WV Human Rights Act; and 2) No, the Plaintiff does not fall within the exception to the requirement of military membership in the "grandfather clause" contained in the statute. The Adjutant General further requests, based upon this Court's answer to the two-part certified question, that this case be remanded to the circuit court for entry of an Order granting the Adjutant General's motion for summary judgment.

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**CERTIFICATE OF SERVICE**

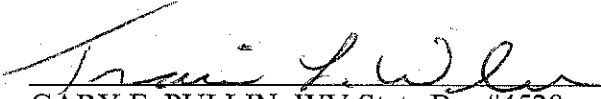
The undersigned counsel for appellant, does hereby certify that a true copy of the foregoing "*Reply Brief*" was served upon counsel of record

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by placing the same in an envelope, properly addressed with postage fully paid and depositing the same in the U.S. Mail, on this the 25<sup>th</sup> day of November, 2008.

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